HON'BLE THE CHIEF JUSTICE SRI G.S. SINGHVI

Writ Petition No.7402 of 1995

Between:

M/s.Praga Tools Limited represented by

Its Company Secretary, Sri Subbarayudu … Petitioner

And

Monopolies and Restrictive Trade Practices

Commission, New Delhi and another … Respondents

Counsel for the Petitioner: Sri P. Nageswara Sree

Counsel for Respondent No.1: Sri A. Rajasekhar Reddy,

Assistant Solicitor General

Counsel for Respondent No.2: Sri B. Nalini Kumar

::ORDER::

April , 2006

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This is a petition for quashing order dated 6-1-1995 by which Monopolies and Restrictive Trade Practices Commission, New Delhi (for short 'the Commission') overruled the preliminary objections raised by the petitioner to the maintainability of the application filed by respondent No.2 under Section 12-B of the Monopolies and Restrictive Trade Practices Act, 1969 (for short 'the Act').

The facts of the case lie in a narrow compass. M/s.Insulation and Electrical Products Private Limited, New Delhi (respondent No.2) is engaged in the manufacture and business of sheet metal components. The buyers of the goods manufactured by respondent No.2 include M/s.Maruthi Udyog Limited, M/s.Mahindra and Mahindra Limited, and M/s.Escorts Limited. Respondent No.2 placed an order on the petitioner M/s.Praga Tools Limited for the supply of Praga Surface Grinder Model 451 with standard accessories. Respondent No.2 paid an amount of Rs.1,37,904/- towards the cost of machine. The petitioner acknowledged the order and payment of price, but did not supply the machine within the stipulated period. Vide letter dated 19-4-1990, respondent No.2 asked for refund of the price, but the petitioner did not repay the amount. After about two years, respondent No.2 is said to have approached the petitioner for execution of order dated 20-3-1990 for supply of the machine. Upon

this, the petitioner is said to have sought clarification regarding the payment of advance and then dispatched the machinery from Hyderabad to Delhi. Respondent No.2 did not take delivery of the machine. Instead, it filed an application under Section 12-B of the Act for award of compensation of Rs.7,31,904/-, which included refund of advance paid, interest and compensation towards the loss of business and harassment.

On being noticed by the Commission, the petitioner filed reply wherein it raised several objections to the maintainability of the application filed by respondent No.2. One of the objections taken by the petitioner was that the so-called default committed by it in complying with the order for supply of machinery does not constitute an 'unfair trade practice' within the meaning of Section 36-A, and, as such, the Commission does not have the jurisdiction to entertain the application. It was also pleaded that the application filed by respondent No.2 was barred by time. Another plea taken by the petitioner was that the application of respondent No.2 was liable to be dismissed on account of non-compliance of Regulation 77 of the Monopolies and Restrictive Trade Practices Regulations, 1991.

On the pleadings of the parties, the Commission framed various issues including the one relating to maintainability of the application filed by respondent No.2.

By the impugned order, the Commission overruled the objections raised by the petitioner and fixed the case for final arguments.

Sri P. Nageswara Sree, learned counsel for the petitioner reiterated the objections taken by the petitioner to the maintainability of the application filed by respondent No.2 and argued that the Commission committed a jurisdictional error by not dismissing the application. Learned counsel submitted that the Commission can award compensation only if, as a result of monopolistic or restrictive or unfair trade practice carried on by any undertaking or person, any loss or damage is caused and not otherwise, and argued that the default committed by the petitioner in the matter of supply of machine to respondent No.2 within the specified time cannot be construed as monopolistic, restrictive or unfair trade practice so as to confer the jurisdiction on the Commission to entertain the same. Sri Nageswara Sree emphasized that the omission on the petitioner's part to supply the machinery to respondent No.2 neither constitutes 'monopolistic trade practice' or 'restrictive trade practice' as defined in Section 2 (i) and 2 (o) or 'unfair trade practice' as defined under Section 36-A and,

therefore, the Commission cannot entertain or adjudicate the application filed by respondent No.2. He then argued that the reason assigned by the Commission for rejecting the objection taken by the petitioner in the context of Regulation 77 of the 1991 Regulations is per se erroneous and the order under challenge is liable to be declared as vitiated by an error of law.

Sri B. Nalini Kumar, learned counsel for respondent No.2 supported the order under challenge and argued that writ petition filed by the petitioner questioning the interlocutory order passed by the Commission should be dismissed as not maintainable. He further argued that the petitioner had deliberately omitted to supply the goods within the specified time and, therefore, respondent No.2 is entitled to reasonable compensation.

I have thoughtfully considered the respective arguments. Section 12-B (1), which empowers the Commission to award compensation, Sections 2 (i), (o) and Section 36-A, which defines the terms 'monopolistic trade practice', 'restrictive trade practice' and 'unfair trade practice' read as under:

> **"12-B Power of the Commission to award compensation:**
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> (1) Where, as a result of the monopolistic or restrictive, or unfair, trade practice, carried on by any undertaking or any person, any loss or damage is caused to the Central Government, or any State Government or any trader or class of traders or any consumer, such Government or, as the case may be, trader or class of traders or consumer may, without prejudice to the right of such Government, trader or class of traders or consumer to institute a suit for the recovery of any compensation for the loss or damage so caused, make an application to the Commission for an order for the recovery from that undertaking or owner thereof or, as the case may be, from such person, of such amount as the Commission may determine, as compensation for the loss or damage so caused.
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> **2. Definitions:**
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> **(i) "monopolistic trade practice"** means a trade practice which has, or is likely to have, the effect of--
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> > (i) maintaining the prices of goods or charges for the services at an unreasonable level by limiting, reducing or otherwise controlling the

production, supply or distribution of goods of any description or the supply of any services or in any other manner;

(ii) unreasonably preventing or lessening competition in the production, supply or distribution of any goods or in the supply of any services;

(iii) limiting technical development or capital investment to the common detriment or allowing the quality of any goods produced, supplied or distributed, or any service rendered, in India to deteriorate;

(iv) increasing unreasonably,--

a. the cost of production of any goods; or

b. charges for the provision, or maintenance, of any services;

(v) increasing unreasonably,--

a) the prices at which goods are, or may be, sold or resold, or the charges at which the services are, or may be provided; or

b) the profits which are, or may be, derived by the production, supply or distribution (including the sale or purchase) of any goods or by the provision of any services;

(vi) preventing or lessening competition in the production, supply or distribution of any goods, or in the provision or maintenance of any services by the adoption of unfair or deceptive practices;

…

(o) "restrictive trade practice" means a trade practice which has, or may have the effect of preventing, distorting or restricting, competition in any manner and in particular,--

i) which tends to obstruct the flow of capital or resources into the stream or production, or

ii) which tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs or restrictions;

36A. Definition of unfair trade practice:

In this Part, unless the context otherwise requires, "unfair trade practice" means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any services, [adopts any unfair method or unfair or deceptive practice including any of the following

practices], namely:-

(1) The practice of making any statement, whether orally or in writing or by visible representation which,—

(*i*) falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or model;

(*ii*) falsely represents that the services are of a particular standard, quality or grade;

(*iii*) falsely represents any rebuilt, second-hand, renovated, reconditioned or old goods as new goods;

(iv) represents that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have;

(v) represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not have;

(vi) makes a false or misleading representation concerning the need for, or the usefulness of any goods or services;

(*vii*) gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that it is not based on an adequate or proper test thereof:

Provided that where a defence is raised to the effect that such warranty or guarantee is based on adequate or proper test, the burden of proof of such defence shall lie on the person raising such defence;

(*viii*) makes to the public a representation in a form that purports to be—

(*i*) a warranty or guarantee of a product or of any goods or services; or

(*ii*) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result,

if such purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that such warranty, guarantee or promise will be carried out;

(ix) materially misleads the public concerning the price at which a product or like products or goods or services, have been, or are ordinarily sold or provided, and, for this purpose, a representation as to price shall be deemed to refer to the price at which the product or goods or services has or have been sold by sellers or provided by suppliers generally in the relevant market unless it is clearly specified to be the price at which the product has been sold or services have been, provided by the person by whom or on whose

behalf the representation is made;

(x) gives false or misleading facts disparaging the goods, services or trade of another person.

Explanation: For the purposes of clause (1), a statement that is –

a) expressed on an article offered or displayed for sale, or on its wrapper or container; or

b) expressed on anything attached to, interested in, or accompanying, an article offered or displayed for sale, or an anything on which the article is mounted for display or sale, or

c) contained in or on anything that is sold, sent, delivered, transmitted or in any other manner whatsoever made available to a member of the public,

shall be deemed to be a statement, to the public by, and only by, the person who had caused the statement to be so expressed, made or contained;

(2) permits the publication of any advertisement whether in any newspaper or otherwise, for the sale or supply at a bargain price, of goods or services that are not intended to be offered for sale or supply at the bargain price, or for a period that is, and in quantities that are reasonable, having regard to the nature of the market in which the business is carried on, the nature and size of business and the nature of the advertisement.

Explanation: For the purpose of clause (2), "bargain price" means—

a. a price that is stated in any advertisement to be a bargain price, by reference to an ordinary price or otherwise, or

b. a price that a person who reads, hears, or sees the advertisement, would reasonably understand to be a bargain price having regard to the practices at which the product advertised or like products are ordinarily sold;

(3) permits—

a) the offering of gifts, prizes or other items with the intention of not providing them as offered or creating the impression that something is being given or offered free of charge when it is fully or partly covered by the amount charged in the transaction as a whole.

b) the conduct of any contest, lottery, game of chance or skill, for the purpose of promoting, directly or indirectly, the sale, use or supply of any product or any business interest.

(4) permits the sale or supply of goods intended to be used, or are of a kind likely to be used, by consumers, knowing or having reason to believe that the

goods do not comply with the standards prescribed by competent authority relating to performance, composition, contents, design, con- structions, finishing or packaging as are necessary to prevent or reduce the risk of injury to the person using the goods;

(5) permits the hoarding or destruction of goods, or refuses to sell the goods or to make them available for sale, or to provide any service, if such hoarding or destruction or refusal raises or tends to raise or is intended to raise, the cost of those or other similar goods or services."

An analysis of Section 12-B reproduced above makes it clear that the Commission can entertain and adjudicate an application filed for award of compensation only where any loss or damage is caused to the applicant as a result of monopolistic or restrictive or unfair trade practice carried on by any undertaking or by any person. In other words, the loss or damage caused as a result of employment of monopolistic or restrictive or unfair trade practice is a condition precedent to the entertaining of an application filed under Section 12-B. The term 'monopolistic trade practice' has been defined as any practice which has, or is likely to have the effect of maintaining the prices of goods or charges for the services at an unreasonable level by limiting, reducing or otherwise controlling the production, supply or distribution of goods of any description or the supply of any services; or unreasonably preventing or lessening competition in the production, supply or distribution of any goods or in the supply of any services; or limiting technical development or capital investment to the common detriment or allowing the quality of any goods produced, supplied or distributed, or any service rendered in India to deteriorate. The term 'restrictive trade practice' means a trade practice which has, or may have the effect of preventing, distorting or restricting, competition in any manner which tends to obstruct the flow of capital or resources into the stream of production; or which tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs or restrictions. The term 'trade practice' as defined in Section 2 (u) to mean any practice relating to the carrying on of any trade, and includes anything done by any person which controls or affects the price charged by, or the method of trading of, any trader or any class of traders; and a single or isolated action of any person in relation to any trade. However, the term 'unfair trade practice' has not been defined in Section 2. In Section 36-A, the term 'unfair trade practice' has been

defined, but this definition is relevant for the purpose of Part-B of Chapter V and not for other provisions of the Act. This is evident from the opening sentence of this section. As per this definition, 'unfair trade practice' means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any services, adopts any unfair method or unfair or deceptive practice including the practice of making any statement, whether orally or in writing by visible representation, which falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or model; or falsely represents that the services are of a particular standard, quality or grade; or falsely represents any re-built, second-hand, renovated, reconditioned or old goods as new goods; or represent that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits, which such goods or services do not have; or represent that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not have; or makes a false or misleading representation concerning the need for, or the usefulness of any goods or services; or gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on an adequate or proper test thereof; or makes to the public a representation in a form that purports to be a warranty or guarantee of a product of any goods or services; or a promise to replace, maintain or repair an article or any part thereof or to repeal or continue a service until it has achieved a specified result; or materially misleads the public concerning the price at which a product or goods or services, have been, or are ordinarily sold or provided; or gives false or misleading facts disparaging the goods, services or trade of another person.

In my opinion, the default committed by the petitioner in the supply of goods to respondent No.2 does not fall within the ambit and scope of the definitions of monopolistic or restrictive or unfair trade practice. In the application filed by it, respondent No.2 gave a brief account of the events relating to placement of order on the petitioner to supply 'Praga Service Grinder Model 451 with standard accessories', payment of price, vide cheque No.447273 dated 26-3-1990, failure of the petitioner to supply the goods, and claimed that this amounted to calculated fraud. In paras 11, 12 and 15 of the application, respondent No.2 averred as under:

> "11. That the manner in which the respondent has conducted clearly establishes that respondent has not only played fraud but also cheated the

applicant in a cold planned and calculated manner. By purporting to supply the machine immediately, the respondent has totally failed to fulfill his obligation/commitment towards applicant till date. The said act of respondent is patently an act of unfair trade practice and against all norms of fair business and trade. The conduct of respondent is not supplying the machine immediately despite advance payment by applicant three years ago is totally illegal, unfair and arbitrary. The applicant has suffered loss of business entirely due to fault of respondent.

12. That the respondent having received the advance payment in full was obliged to supply the machine immediately to the applicant. However, the respondent has been playing hide and seek with plaintiff for last three years, which is borne by their last communication purporting to be another acknowledgment dated 16-12-1992 by which the respondent is supposed to have dispatched the machine through M/s.Southern Road Carriers. But, the respondent has failed to supply said machine to applicant even till filing of this petition. Letter dated 16-12-1992 of respondent is annexed as Annexure 'F'.

…

15. That apart from aforesaid, the applicant has been subjected to unwarranted harassment, mental agony and prejudice by totally unfair acts of omissions and commissions of respondent. The respondent is thus liable to compensate the applicant, in respect of harassment and mental agony caused by respondent, for a sum of Rs.3 lakhs. The applicant claims the said sum of Rs. 3 lakhs from respondent."

None of the aforementioned allegations constitute 'monopolistic practice' or 'restrictive trade practice', as defined in Section 2 (i) and (o) of the Act. It does not fall even within the ambit of 'unfair trade practice', as defined in Section 36-A of the Act. Therefore, the loss allegedly caused to respondent No.2 due to the failure of the petitioner to supply goods cannot entitle respondent No.2 to claim compensation under Section 12-B.

While dealing with the issue of maintainability of the application, the Commission referred to Sections 12-B and
36-A, but did not consider whether the petitioner's failure to execute the order and deliver the goods to the applicant (respondent No.2 herein) constitutes a monopolistic or restrictive or unfair trade practice. In my considered view, the petitioner's failure to supply the goods to respondent No.2 in terms of order dated

20-3-1990 placed by the latter does not constitute monopolistic, restrictive or unfair trade practice, as defined in the Act and, therefore, the Commission does not have the jurisdiction to entertain and adjudicate the application filed by respondent No.2 under Section 12-B of the Act for award of compensation.

In the result, the writ petition is allowed. Order dated
6-1-1995 passed by the Commission is quashed. As a consequence of this, the application filed by respondent No.2 under Section 12-B of the Act shall stand dismissed. However, it is made clear that respondent No.2 shall be free to avail appropriate legal remedy for award of damages in lieu of the alleged loss caused to it on account of non-supply of goods by the petitioner.

G.S. SINGHVI, CJ

12th April , 2006

svs